No. 77-480

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the court of appeals is unreported. The National Labor Relations Board's decision and order (Pet. App. A5-A17) are reported at 225 NLRB 421.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A4) was entered on June 30, 1977. The petition was filed on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The decision of the Administrative Law Judge is not included in the appendix. It is reported at 225 NLRB 421, 424-428.

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that a union violated Section 8(b)(1)(B) of the National Labor Relations .Act by coercing an employer into discharging its general service manager.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 2-3.

STATEMENT

The following facts were found by the National Labor Relations Board. Early in 1975, petitioner (herein "the Union") won a representation election among the service department employees of Atherton Cadillac, Inc. (herein "the Company"). (Pet. App. A6.) During the last week of the organizational campaign which preceded the election, Company General Service Manager Anthony Dazzo, in an effort to discourage union support, laid off several employees (including a member of the Union's organizing committee), announced that there would be further layoffs the following week, and stated that he intended to reduce an employee's wage (Pet. App. A6). Several days after the election, Union Secretary Louis Salvatore and Union representative Steven Elliot asked Dazzo to recall the laid-off employees. When Dazzo refused, Salvatore stated that "this was a declaration of war." (Pet. App. A6-7.) The next day Salvatore and Elliot asked Company President Atherton, Sr., to recall the laid-off employees. Atherton, Sr., responded that the business was suffering losses and asserted that Dazzo was in charge of the shop. Salvatore replied that "Mr. Dazzo is creating trouble." (Pet. App. A7.)

Several days later mechanics in the service department engaged in a two-hour work slowdown to protest a turning away of work which they believed had been ordered by Dazzo. The next day Company Vice President Atherton, Jr., asked two members of the Union organizing and bargaining committees what had prompted the slowdown. They explained that "the problem is Dazzo." Atherton, Jr., asked the two men if they had any recommendations for a replacement for Dazzo; they suggested an employee, who was given the job following Dazzo's subsequent discharge. (Pet. App. A7.)

Thereafter, on February 3, bargaining negotiations began. Previously the employees had agreed to a strike deadline of March 1 should negotiations not prove successful by that date. At the opening bargaining session the Union set forth its initial proposal. At none of the ensuing five bargaining sessions in February would the Union modify its initial demands. Rather, Union Secretary Salvatore informed the Company that the Union was refusing to change its proposals because Dazzo was "making things tough, harassing the committee, this is why the men are not being flexible, and why they want the contract terms that have been proposed." (Pet. App. A8.)

After being informed at the February 27 session that the Union was still not inclined to make changes in its proposals, the Company negotiators asked for a half-hour adjournment. When bargaining resumed, Company attorney Stone announced that Dazzo had been discharged, and further stated "we feel that is the problem and we are going to get rid of the problem forever." (Pet. App. A8-9.)

That evening, the service department employees met with the Union negotiating representatives. The employees now urged the negotiators to lower their bargaining proposals and reach a contract as quickly as possible because the biggest problem—Dazzo—was gone. (Pet. App. A9.) Accordingly, at the next bargaining session, the Union reduced its wage increase and incentive proposals, and, with these modifications, agreement was reached and the parties entered into a contract. (Pet. App. A9, 11-12 n. 4.)

On a charge by Dazzo, the Board's General Counsel issued a complaint alleging that the Union had violated Section 8(b)(1)(B) of the Act[2] by conditioning concessions and agreement in the contract negotiations upon the discharge of Dazzo (Pet. App. A6). After a hearing the Administrative Law Judge dismissed the complaint. The Board reversed. It found "that the evidence although circumstantial was sufficient to establish [the violation charged]" (Pet. App. A11—A13).

The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practice found, to withdraw all objections to Dazzo's employment at the Company, and to make Dazzo whole for any loss of earnings suffered by reason of its unlawful conduct (Pet. App. A15).

The court of appeals enforced the Board's order with a minor modification not relevant here (Pet. App. A1-A4).

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[2]Section 8(b)(1)(B) provides that it is an unfair labor practice to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Dazzo's status as such an employer representative is undisputed.

ARGUMENT

Petitioner's principal claim (Pet. 2, 10-11)—that the Board's holding here "unlawfully restricts the constitutional right of unions to express opinions that are non-coercive in nature"—is not presented on this record because the Board found, as a fact, that the Union's statements were part of a course of conduct which constituted restraint and coercion. The only question actually presented therefore is whether substantial evidence supports that finding.[3] This essentially factual question has been thoroughly considered by the court of appeals and there is no reason for further review by this Court.

Although the Union did not explicitly demand that Dazzo be discharged, there was ample evidence to warrant the Board's conclusion that the Union conditioned relaxation of its bargaining position on the discharge of Dazzo—particularly in view of the Union's swift reduction of its demands and agreement to a contract immediately following Dazzo's discharge. As the Board found (Pet. App. A11—A12):

> While it is true that Dazzo's discharge was never openly demanded, the record reveals an extensive

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[3]Section 8(c) of the Act, 29 U.S.C. 158(c), provides that the "expressing of any views * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal * * *," but this provision does not protect statements which are part of a course of conduct violative of the Act. See *National Labor Relations Board* v. *Gissell Packing Co.*, 395 U.S. 575, 617-620; *National Labor Relations Board* v. *Kropp Forge Co.*, 178 F. 2d 822, 827-829 (C.A. 7), certiorari denied, 340 U.S. 810. In any event petitioner did not raise its contentions concerning Section 8(c) (Pet. 10-11) before the Board or the court of appeals. Under settled principles, it therefore cannot raise them here. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256; *National*

pattern of statements and conduct through which Respondent conveyed a clear message to the Employer to discharge Dazzo and evidenced its unlawful motive. Thus, after an argument concerning the layoffs, for which Dazzo was responsible, Respondent's representatives "declared War" on Dazzo. Atherton, Sr., was thereafter told that Dazzo was creating trouble. After the slowdown, McDonald told Atherton, Jr., that the problem was Dazzo and suggested a replacement for him. During the negotiations Salvatore admitted that the bargaining strategy and proposals and the inflexibility with respect thereto were because of Dazzo. In sum, Respondent's message to fire Dazzo and its hostility toward Dazzo were repeatedly communicated to the Employer.

We view as particularly significant the fact that shortly after Dazzo's discharge Respondent substantially lowered its bargaining demands and agreed to negotiate past the strike deadline of March 1; in fact, agreement was reached on March 3. This change in bargaining strategy occurred after Salvatore met with Cadillac's service department employees on February 27. At this meeting, the employees, who had previously protested the shop conditions for which Dazzo was responsible and who had previously said they could not work with Dazzo, told Salvatore to try and wrap up negotiations, modify their bargaining proposals, and reason with management, because the biggest problem, Dazzo, was gone. We are additionally persuaded by the fact that the Employer

Labor Relations Board v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

discharged Dazzo only after it was clear that bargaining was hopelessly stymied. Yet its stated reason involved the events surrounding the work slowdown, which occurred at least a month previously. [Footnote omited.]

The Board's inference of unlawful Union motivation thus was supported by substantial evidence on the record taken as a whole.[4] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 602.

[4]Petitioner's further contention (Pet. 26-29) that the Board improperly refused to draw an adverse inference from the General Counsel's failure to call Company President Atherton, Sr., as a witness similarly presents no issue for this Court. Dazzo, who was the charging party in this case, testified that Atherton, Sr., told him that he had been discharged because of pressure from the Union. The General Counsel presented a letter of reference on Company stationery signed by Atherton, Sr., stating that Dazzo had been discharged "to avoid a strike." (Pet. App. 9-10.) Atherton, Sr., was not called to testify by either party. Since the Company was not aligned in this dispute with either Charging Party Dazzo or the Respondent Union, Atherton, Sr.—as president of the Company—was equally available to either side of the dispute. Consequently, the Board was not compelled to draw an inference adverse to Dazzo's testimony due to Atherton's absence from the trial. See, *e.g.*, *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, 903 (C.A. 2). In any event, the Board did not rely on Dazzo's testimony in reaching its conclusion because it agreed with petitioner that the disputed testimony was hearsay. (See Pet. App. A11-A12.) Thus, even if the Board erred in failing to draw the adverse inference, the error was not prejudicial. *National Labor Relations Board* v. *Paul Blazevich*, 374 F. 2d 974, 981, (C.A. 9), certiorari denied, 389 U.S. 913.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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